1989

Cornish Town v. Evan O. Koller : Brief of Appellant

Utah Supreme Court

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George W. Preston; Preston and Chambers; M. Byron Fisher; Fabian and Clendenin; Attorneys for Plaintiffs and Appellants.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

CORNISH TOWN, a Municipal corporation

Plaintiffs, Respondents

vs.

EVAN O. KOLLER and MARLENE B. KOLLER, husband and wife

Defendants, Appellants

Case No. 890020

B R I E F O F A P P E L L A N T S

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, The Honorable VeNoy Christoffersen presiding

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STATEMENT OF JURISDICTION

This is an appeal from the entry of Amended Findings of Fact, Conclusions of Law and Amended Decree entered by the Honorable VeNoy Christoffersen, District Judge, following an appeal reversal, and remand by this court where the Trial Court, upon the oral motion of Plaintiff, without prior notice to Defendants, amended paragraph 5 of the Findings of Fact, contrary to this court's previous opinion, altering the Defendants' right to receive culinary water. This Court has jurisdiction of this appeal under the provisions of Section 78-2-2(3)(i) 1987 and Rule 3A of the Rules of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS BELOW

This action was filed by Cornish Town against Evan O. Koller and Marlene B. Koller in 1979 to determine the ownership of rights-of-way over the Kollers' land and the ownership of culinary water used by Cornish and the Kollers from springs situated on the Koller property. The case was tried by the Honorable VeNoy Christoffersen on February 16, 17 and 18 of 1983. Findings of Fact, Conclusions of Law and a Judgment were entered on April 26, 1984. The Trial Court determined issues of rights-of-way, ownership of the water and held that the town had right to determine whether Kollers should be supplied water from the town's water supply or from the spring from which Kollers' reservation was made.

Defendants perfected an appeal to the Utah Supreme Court relative to the source of Defendants' culinary water, damages and other matters. Plaintiff cross-appealed challenging the Trial Court's Findings of Fact, Conclusions of Law and the division of the water. The matter was orally argued. On July 20, 1988 the Supreme Court of the State of Utah rendered its decision affirming the Trial Court relative to all issues except the finding of the Trial Court relative to the source from which the Koller's culinary water must be supplied. See Cornish v. Koller, 758 P.2d 919 (1988). See Addendum B.

The Supreme Court reversed the Trial Court holding that the town must comply with the provisions of the Kollers' deed reserving the water right from the Pearson Spring. The town must now provide the Defendants with culinary water from the Pearson Spring and not other sources of water. Following the decision by the Supreme Court, the Defendants submitted Amended Findings of Fact, Conclusions of Law and an Amended Judgment consistent with the opinion of the Supreme Court. Defendants also sought to correct clerical errors in the Judgment. At the hearing on November 15, 1988, Plaintiff concurred with the Amended Findings of Fact in accordance with the decision of the Supreme Court but objected to the correction of some clerical errors and submitted written objections.

At the hearing, Counsel for Cornish, without prior notice to the Defendants, orally moved the Court to make an additional Finding of Fact to be added to the end of paragraph 5 of the Findings of Fact regarding the location of Kollers' tap into the Cornish water line. The modification substantially affected Defendants' right to receive culinary water. The Court granted the Plaintiff's oral motion and on the 15th day of December, 1988, entered Amended Findings of Fact, Conclusions of Law and an Amended Judgment incorporating the substance of Plaintiff's oral motion. Written objections were made to the amended Finding of Fact incorporating the modified paragraph. See Addendum A. The Trial Court denied Defendants' motion objecting to the entry of the Amended Findings of Fact. Defendants thereafter filed a Notice of Appeal.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented on appeal is:

(1) Whether or not the Trial Court procedurally erred in entertaining the Plaintiff's oral motion to amend a finding of fact substantially modifying Defendants' water right, where the motion was made without notice to the Defendants, and was made more than 4 1/2 years after the entry of the initial Finding; and

(2) Whether or not the Trial Court substantively erred in modifying the Findings of Fact made 4 1/2 years earlier.

STATEMENT OF RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

14th Amendment U.S. Constitution and Article I, Section 7 Utah Constitution.

STATEMENT OF THE CASE

I. NATURE OF THE CASE. This is a proceeding supplemental to remand on appeal by Cornish Town to amend the Findings of Fact signed by the Trial Court on April 26, 1984, which were subject to an appeal decided by this Court July 20, 1988, and remanded for further proceedings consistant with the opinion.

II. A COURSE OF PROCEEDINGS AND DISPOSITION BEFORE THE LOWER COURT. This case was tried before the Honorable VeNoy Christoffersen on February 16, 17 and 18 of 1983. The Court thereafter entered Findings of Fact, Conclusions of Law and a Judgment on April 26, 1984. The Defendants appealed from the Judgment of the District Court, relative to Findings involving the source of Defendants' culinary water supply.

On the 20th day of July, 1988, this Court rendered its decision affirming the Trial Court relative to all issues except a finding of the Trial Court that the town may supply Defendants' water from the town's general water sources.

The Supreme Court remanded the matter back to the District Court for "proceedings consistent with the decision."

The Defendants submitted Amended Findings of Fact, Conclusions of Law and an Amended Judgment to the Court consistent with the decision of the Utah Supreme Court. In addition thereto, Kollers sought the correction of clerical errors appearing in the original Findings of Fact, Conclusions of Law and Judgment and Decree. The Plaintiff submitted written objections to the correction of the clerical errors. A hearing was held on the 15th day of November, 1988, in the District Court of Cache County to resolve the issues brought before the Court by the submission of Amended Findings of Fact, Conclusions of Law and a Judgment as evidenced by the Plaintiff's written objections. During the course of this hearing Plaintiff's Attorney orally moved to amend Finding of Fact No. 5. The motion was made without notice to the Kollers as required by the Rules. In substance, Plaintiff's motion gives Cornish the right to alter the established point at which the Kollers' tap into the Cornish water line giving Cornish the option to substantially modify the culinary water the Kollers reserved. The Trial Court granted Plaintiff's oral motion. The Defendants' appeal from the Court's entertaining the motion and granting the motion as found in the Amended Findings of Fact, Conclusions of Law.

III. STATEMENT OF FACTS. At the time of the initial trial of this matter on February 16, 17 and 18 of 1983, Defendants proffered evidence to the Court to the effect that

Plaintiff's predecessor in interest were the owners of a culinary water right from the Pearson Spring as evidenced by a Deed wherein:

> "Grantors reserve the right to use the water for human drinking and stock watering purposes. This use to be confined to a water flow through a 3/4 inch tap, and Grantee agrees to pipe the said water to the home of Lars Pearson for culinary and domestic purposes. All water to be measured through a culinary water meter."

Cornish v. Koller, 758 P.2d 919, 921 (Utah 1988). Addendum B.

The Trial Court in the initial proceeding made and entered Findings of Fact, Conclusions of Law and a Decree. Cornish v. Koller, infra, page 920. Findings of Fact, paragraph 5, states as follows:

> 5. Defendants' predecessor in interest reserved the right to use water for human drinking and stock watering purposes. This flow to be confined to a water flow through a 3/4 inch tap and Grantees agree to pipe the said water to the home of Lars Pearson, Defendants' predecessor for culinary and domestic purposes. All water to be measured through a culinary water meter. The tap is situated approximately 50 feet west of the Defendants' residence. (Emphasis ours)

Paragraph 5 contained material recitations relative to the appeal by Kollers to the Supreme court of the State of Utah. It was cited verbatim by the Supreme Court in its decision dated July 20, 1988. (See page 920) This Court

affirmed in part the decision of the Trial Court and reversed the decision of the Trial Court as it relates to Finding of Fact paragraph 20 which was as follows:

> 20. The Court finds that the Defendants are to receive the water that Defendants are not entitled to say where they receive it from, and that the source is not restricted solely to the Pearson Spring. The Court finds that the Defendants are entitled to determine where the union with the Cornish line will be located and shall thereafter provide and pipe through a 3/4 inch tap to the home of the Defendants' culinary water as set forth in the deed. (Emphasis ours)

The Supreme Court held that since Kollers' predecessor in interest did not own the Cornish water system, Kollers' predecessor in interest could not have reserved to themselves rights to the water from that system, and, therefore, Kollers were entitled to have their culinary water right, which was the subject of a conveyance, flow from the Pearson Spring. This Court recited but reversed no other Finding of Fact. See Cornish Town v. Koller, 758 P.2d 919 (Utah 1988).

Following the decision by this Court Defendants submitted to Plaintiff Amended Findings of Fact and Conclusions of Law. Record p. 91-102. Paragraph 20 of the Findings of Facts was amended consistent with the opinion. Cornish made no objections to that amendment. (Tr. p. 34.) Defendants also sought to correct clerical errors made in the initial Findings of Fact, Judgment and Decree by including

State Engineer WUC numbers, (Tr. p. 24 to 33) changing dates of the irrigation season to conform to State Engineer records. (Tr. p.26) These issues were heard by the Trial Court and appropriate corrections of clerical errors were made by the Court in a hearing on November 15, 1988. At that hearing the Court had before it written objections which were properly noticed for hearing. At that hearing Counsel for Cornish, without notice to the Kollers and without submitting a written motion, orally moved the Court to make an additional Finding of Fact to be added to paragraph 5 of the Findings of Fact. (Tr. p. 5 - 22) Until that time neither party had appealed from, nor objected to paragraph 5 of the Findings of Fact. Over Kollers' objection Cornish proposed in the oral motion (Tr. p. 5) an amendment as follows to be added to the end of paragraph 5:

> However, as long as Cornish provides the water through a 3/4 inch tap from the Pearson Spring that complies with the deed regardless of where the tap is located in relation to the residence. Addendum A.

Counsel for Cornish then represented to the Court that Cornish intended to construct a diversion box along Cornish's main water line and to situate a 3/4 inch tap into the diversion box from which Kollers' water would then flow down hill to the Koller residence. (Tr. p. 8) Presently Kollers' tap into the water line 50 feet west of their house is at a pressure of 100+ psi. (Tr. p. 19 - 21) The amendment would

allow Cornish to situate the 3/4 inch restriction (tap) at a place where there is zero pressure, (Tr.p.20) thus dramatically limiting the amount of water Kollers may receive for culinary purposes. (Tr. p. 9) The Kollers objected to the amendment stating that Cornish was obligated to furnish water to the home of Lars Pearson where the Kollers might then tap into the line, which tap was situated approximately 50 feet west of the residence. Cornish admitted that the intent of the amendment was to further quantify Kollers' water. (Tr. p. 2, line 20; Tr. p. 10, lines 16, 17) Cornish had tried to limit Kollers' water by prior motions (Record p. 13-14 and 33-34) without success. The Kollers claimed the motion was an attempt to retry the case. (Tr. p. 12) The Trial Court, without taking evidence, granted Plaintiff's Motion to amend paragraph 5 of the Findings of Fact. (Tr. p. 22) Plaintiff's Counsel incorporated the amendment into Amended Findings of Fact along with the corrected clerical errors requested by Defendants and the Court thereafter executed Amended Findings of Fact, Conclusions of Law (Record p. 133-144) and an Amended Judgment (Record p. 146-153) Addendum A.

SUMMARY OF ARGUMENTS

Appellants claim that the Trial Court procedurally erred in entertaining Plaintiff's oral motion to amend a finding of fact which had been unchanged since April 26, 1984, when the

original decree was entered. The motion, by Plaintiff, without prior notice to the Defendants, (notwithstanding the fact that it was orally made in the course of the hearing) fails to comply with the Utah Rules of Civil Procedure and the Code of Judicial Administration. Further, the Trial Court substantially erred in granting the Plaintiff's oral motion as it is apparent that the Plaintiff was using the motion as a substitute for the appellate process to circumvent the Supreme Court's ruling by amending the paragraph whereby the town might be able to limit the quantity of water delivered to the Koller residence by changing the location of the Kollers' tap into the Cornish Town line to a point where the water would flow through the tap at a substantially reduced pressure thereby limiting gallonage.

The issue having been decided and not appealed. The motion should not have been granted based upon the doctrine of res judicata and collateral estoppel.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S ORAL MOTION TO AMEND FINDING OF FACT NUMBER 5.

Notwithstanding the fact that this case was on appeal from the Trial Court decision rendered April 26, 1984, Plaintiff on July 12, 1988, sought further clarification from the Trial Court regarding the extent of Kollers' water rights

and sought a permanent injunction to have the court establish a quantifiable limit on the amount of water Kollers could use from the Pearson Spring. A hearing was held and the Trial Court concluded that it had heard no evidence that the Defendants were wasting water or unreasonably using the water. Therefore, the Trial Court concluded on August 12, 1988, that there was no necessity of quantifying the amount of Kollers' water from the Pearson Spring. (Memo Decision August 30, 1988) In a second instance a water line had been replaced by the Kollers from Griffiths Spring (not involved in this case) by Kollers which the town objected to and upon hearing held August 12, 1988 and November 15, 1988, the Trial Court again denied Cornish's efforts to limit the water used by the Kollers. The oral motion made by Cornish Town on November 15th to amend paragraph 5 of the Findings of Fact was another attempt on the part of Cornish Town to limit or quantify waters received by the Kollers under the terms of their reservation. (Tr. p. 9, 10) All other motions, objections and matters heard by the Court on November 15th were in writing with notice given to opposing counsel.

The Trial Court erred in entertaining the Plaintiff's Motion. Rule 52 of the Utah Rules of Civil Procedure provides as follows:

> Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity

of the Trial Court to judge the credibility of the witnesses.

Sub-paragraph (b) of the same rule provides as follows:

> Upon motion of any party not later than ten (10) days after the entry of the judgment the court may amend its findings of fact to make additional findings or may amend the judgment accordingly. (Emphasis added)

The oral motion of Cornish Town fails to comply with Rule 52 of the URCP since judgment in this case was entered on April 26, 1984. The subject matter in Finding number 5 was recited verbatim in the Supreme Court Decision, 758 P.2d at page 920, and neither party, during the course of the initial appeal, sought to object to nor amend this Finding of Fact. Therefore, under the provisions of Rule 52 the Trial Court erred in entertaining the Plaintiff's oral motion.

Rule 59(b) of the Utah Rules of Civil Procedure relating to motions to alter or amend judgments provides that the motion shall not be made not later than ten (10) days after the entry of the judgment. Again, Plaintiff's motion, if brought under Rule 59(e) was not timely brought before the Court and the Trial Court had no alternative but to deny the motion. Burgess v. Maiben, 652 P.2d 1320 (Utah 1982).

Article 4-501 of the Code of Judicial Administration adopted October, 1988, states as its intent the establishment of uniform procedures for the filing of motions, supporting memoranda and documents with the court. It also seeks to establish a uniform procedure for insuring timely and

adequate notice of matters placed on the law and motion calendar and set for hearing. It is therefore obvious that Plaintiff's oral motion, in the nature of a motion to make an additional finding or to amend the finding of fact made pursuant to Rule 52 of the Utah Rules of Civil Procedure violates the letter and spirit of Rule 4-501 of the Code of Judicial Administration.

For the Defendants to argue that the Kollers responded to the motion and were not prejudiced by the fact that the motion was made orally cannot justify the motion. (Tr. p. 17 and 19) Had the Kollers received notice, evidence may have been obtained to show that the contemplated change of location of the tap into the line would have a significant effect upon the culinary water available to the Kollers for daily household uses and particularly in situations where water was necessary for fire fighting. The Trial Court, in entertaining the motion, deprived the Plaintiffs of a valuable property right without due process of law. Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983)

The Defendants having failed to receive timely and adequate notice of the motion by the Plaintiff, were unable to respond to the motion with the introduction of evidence showing their detriment.

Nor can Plaintiff use Rule 60(b) to amend the finding. Rule 60(b) relates to relief from a judgment. Findings No.

5 is not a judgment and therefore Rule 60(b) is not the proper rule to proceed under. Essentially Plaintiff's oral motion circumvented the court's motion practice and the appellate process and is 4 1/2 years late. Young v. Western Piling & Sheeting, 680 P.2d 394 (Utah 1984); Laub v. South Central Utah Telephone Association, 657 P.2d 1303 (Utah 1982).

POINT II

THE TRIAL COURT ERRED IN ALTERING FINDING OF FACT NO. 5.

The oral motion by the Plaintiff was not made to correct clerical error. Plaintiff's Motion for Summary Disposition concedes that fact. Plaintiff's oral motion was made for the purpose of re-interpreting paragraph 5.

Plaintiff claims in their motion for summary disposition the issue is not determined in prior proceedings. However, the following conversation took place between court and counsel at page 18 of the transcript:

> Mr. Preston: ...it was the city's obligation to deliver water down to this point so that the Pearsons could tap into the line.
>
> The Court: It is the city's obligation to provide water off the Pearson Spring line through a 3/4 inch tap and then pipe it to the house.
>
> Mr. Preston: I don't think that's a reasonable interpretation of the deed.
>
> The Court: Well I know and I have not ...

> Mr. Preston: Why did the Court find that the tap was 50 feet West of the residence?
>
> The Court: I guess because you told me that's where it was.
>
> Mr. Preston: And everything that you found in there is in the record somewhere, that is found in the record.
>
> Mr. Burnett: I am disputing the tap was in fact there. The question is the significance of that. Does it mean we can't change it? I don't see why we can't.
>
> Mr. Preston: I don't mind them changing the tap, but what they are doing is limiting the flow of the water by four times.
>
> The Court: Are they obligated under this deed to provide a 3/4 inch tap?
>
> Mr. Preston: That's right... at the home of Lars Pearson.
>
> The Court: No it doesn't say at the home of Lars Pearson.
>
> Mr. Preston: Then the Court found before it was at the home of Lars Pearson. Is the Court finding somewhere else?
>
> The Court: I am saying that's where you had the 3/4 inch tap which I guess was a fact.
>
> Mr. Preston: That's exactly. There was a 3/4 inch restriction at the home of Lars Pearson.

Notwithstanding this conversation between Court and Counsel, the Trial Court allowed the Plaintiff to amend Finding of Fact no. 5 to include the following language:

> However, as long as Cornish provides the water through a 3/4 inch tap from the

> Pearson Springs that complies with the deed, regardless of where the tap is located in relation to the residence.

It is obvious from the record that the motion was a substantive amendment of a finding of fact which substantially altered the Defendants' rights to receive culinary water from the Pearson Springs.

Defendants maintain presently (and have maintained throughout the course of these proceedings) that Cornish has the obligation, under the reservation, to provide water from the Pearson Spring's main line and to pipe the water to the Defendants' residence where the Defendants then may tap into the line with a 3/4 inch tap to provide culinary water to their residence. The Findings of Fact recited by this Court, (758 P.2d at page 919, 920) in its decision, determine that issue as evidenced by the decision.

Assuming, for the purpose of argument, the Plaintiff's motion complied with the Rules of Civil Procedure, it is Defendants' position that the issue of the location of Defendants' tap into the city's line is determined by Finding of Fact No. 5. The Doctrine of res judicata bars the Defendants from re-litigating the issue or from altering substantive rights determined by the court and not timely appealed from.

Note, that no further evidentiary hearing was had at the request of the Plaintiff. Therefore, the Court apparently

granted the motion upon facts found by the Court at the trial in 1983 and recited by the Court in Findings of Fact entered on April 26, 1984. The Amended Findings of Fact No. 5 is now inconsistent with the amended Conclusions of Law where the Court concludes as follows:

> The Court further concludes that the Plaintiff, under such reservation, shall deliver to the Defendants' residence culinary water for human drinking and stock watering purposes <u>through a 3/4 inch tap to the home</u> of the Defendants for the purposes set forth in the grant and reservation of the deed.

The only reasonable interpretation of the Conclusion of Law is as initially found by the Court. See also the Amended Judgment and Decree paragraph 11:

> The reservation of the culinary water rights set forth in paragraphs 2 and 4 hereof is a water right from the waters flowing from Pearson Spring. The Defendants are entitled to have delivered to their home culinary water for human drinking and stock watering purposes through a 3/4 inch tap (a tap being defined as a 3/4 inch inside diameter service connection into a water main or distribution line) <u>at</u> Defendants' residence for the purposes set forth in the reservation including indoor plumbing and customary residential, culinary, domestic uses to exclude the use of the water in a fish pond and crop land irrigation and related uses.
> (Emphasis ours)

Therefore, location of the tap into the line is central to the obligation of Cornish to deliver water to the home of the Defendants from the Pearson Spring.

Cornish argues in their answer to Defendants' Motion for Summary Disposition that the issue is open for decision on remand, arguing that the deed is silent as to the location of the tap and should now be the subject of further interpretation. The Defendants resist the argument for the following reasons:

(1) The Trial Court in 1984 determined the point at which the Kollers tapped into the city's line which was situated 50 feet west of the Koller residence.

(2) This finding was incorporated in paragraph 5 of the Findings of Fact and Conclusions of Law.

(3) The Findings, Conclusions and Judgment relating to the place where the Kollers tapped into the line was not the subject of an appeal nor was the subject of an objection timely filed by the Plaintiff and as such is now res judicata.

This court in its prior decision recited the Findings of Fact as an integral part of the factual background for making its determination that the Kollers' reservation in the deed obligates Cornish to supply water to the Kollers from the Pearson Spring and to pipe the same to their residence where the Kollers may then tap into that line with a 3/4 inch service connection leading to their house.

A. The doctrine of res judicata bars the amendment.

The recent case of Swainston v. Intermountain Health Care, 97 Utah Adv. Rep. p. 25, this court has said as follows:

> There are two branches of res adjudicata, claim preclusion and issue preclusion. Noble v. Noble, 761 P.2d 1369 (Utah 1988). We first consider whether this appeal involves a claim or an issue. An issue may be described as a "certain and material point, affirmed by one party and denied by the other." Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 4 (ed Cir. 1943). A court resolves an issue by making a finding of fact or a ruling on a matter of law. No relief is inherent in the resolution of an issue.

The Swainston case holds that a factual finding is an issue. In Cornish v. Koller, 758 P.2d 919 (Utah 1988) this court found issues relating to the facts set forth in Finding No. 5. The Swainston case defines a 3 prong test for preclusion of issues as follows:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

The answer is clearly in the affirmative as the issue as to where the tap was located, both logically and factually was found to be at the house of Defendants, rather than situated in the middle of a distribution line, the town now proposes.

> (2) Was there a final judgment on the merits?

The decree of the District Court dated April 26, 1984, was, in fact, a final judgment on the merits. Finding No. 5

was incorporated in the appeal process but was not the subject of a claimed error.

> (3) Was the party against whom the plea is asserted a party or in privity with the party to the prior action?

The answer is yes. All parties are the same.

> (4) Was the issue in the first case fully, completely and fairly litigated?

The Defendants assert that the matter was in fact fully, fairly and competently litigated. Evidence was taken and the case was tried over the course of three days. Almost one year was taken for the Trial Court to enter Findings of Fact. See also Copper State Thrift & Loan v. Bruno, 735 P.2d 387 (Court of Appeals); Searle Brothers v. Searle, 588 P.2d 689, 691 (Utah 1978); Madsen v. Borthick, 97 Utah Adv. Rep. 13 (December 12, 1988); White Pine Ranches v. Osguthorpe, 731 P.2d 1076 (Utah 1986); Schaer v. State ex rel. Utah Dep't of Transp., 657 P.2d 1337 (Utah 1983).

It is obvious that the reason a decision on the part of Cornish to change the 3/4 inch tap from the residence of Defendants to a point on the brow of the hill above Defendants' house is their recent reinterpretation of an old finding designed solely for the purpose of attempting to restrict Defendants' culinary water supply.

The last paragraph of this Court's decision in the case of Cornish v. Koller, infra stated that the case was remanded

to the Trial Court for proceedings "consistent" with the opinion. The proceedings of the Trial Court were not consistent with this Court's opinion. See the case of Joseph Wheeler v. City of Pleasant Grove, 746 F. 2d 1437 (5th Circuit Court of Appeals):

> Under the law of the case doctrine both the District Court and the Court of Appeals generally are bound by findings of fact and conclusions of law made by the Court of Appeals in a prior appeal of the same case.... however, the law of the case doctrine does not apply to bar reconsideration of an issue when (1) a subsequent trial produces substantially different evidence, (2) controlling authority
> has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work a manifest in justice.

The Court went on to reiterate that the law of the case doctrine protects against the agitation of settled issues and assures obedience of lower courts to the decision of appellate courts. The appellate court concluded that the Trial Court exceeded its authority on remand since its opinion was inconsistent with the initial Wheeler decision and the Trial Court disregarded the law of the case established therein. Similarly the District Court of Cache County exceed its authority on remand in amending a finding inconsistent with the balance of the facts and conclusions. The District Court of Cache County did not conduct a subsequent trial producing substantially different evidence

nor has the controlling authority changed nor does the prior decision clearly work a manifest injustice on either party.

The remand in this case was neither a general reversal as found in Hutchins v. State of Idaho, 603 P.2d 995 (Idaho 1979) nor does it deal with an issue not passed upon by the appellate court as suggested in Blinzer v. Andrews, 519 P.2d 483 (Idaho 1973); Hulihee v. Heirs of Hueu, 556 P.2d 920 (Hawaii 1976).

If Kollers' motion to correct clerical errors were substantive modifications they too should have been denied as such. It is obvious that the Plaintiff's oral motion to amend was substantive and should have also been denied. Neither party has the right to claim that because the other party attempted a substantive modification of the decree that justifies the other party making substantive modifications.

CONCLUSION

At some point in this litigation there must be a conclusion of the proceedings. Hidden Meadows Development v. Mills, 590 P.2d 1244 (Utah 1979) at page 1249. The doctrine of Res Judicata stands exactly for that proposition. (1B Moore's Federal Practice, 186) The present point at which Kollers tap into the Cornish water line, 50 feet west of the Koller residence, has been in place since 1938. That fact was embodied in Findings of Fact entered by the District Court in 1984, recited by this Court in 1988. The fact was

not only necessary as an interpretation of the deed, but as a finding of fact which was a predicate to a determination by the Supreme Court.

The District Court of Cache County erred in entertaining an oral motion by Cornish Town in violation of established case law and the Utah Rules of Civil Procedure. The Court compounded that error in granting Plaintiff's motion thus substantively amending a finding of fact now inconsistent with the conclusions of law and Decree and in violation of this Court's remand order where this Court remanded the case to the District Court for proceeding consistent with the opinion.

Defendants request this Court reverse the District Court of Cache County, strike the last sentence of paragraph 5 of the Amended Findings of Fact and enter the Amended Findings of Fact, Conclusions of Law, Judgment and Decree as written.

DATED this 24 day of May, 1989.

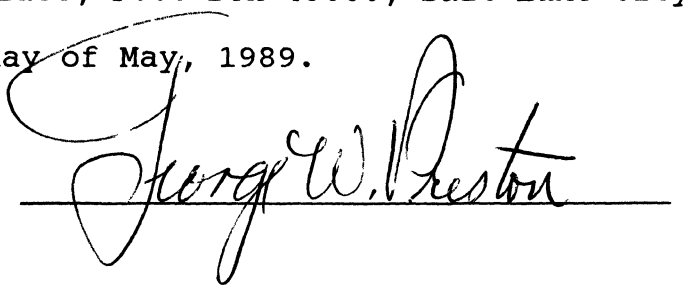
George W. Preston
PRESTON & CHAMBERS

M. Byron Fisher
FABIAN & CLENDENIN

Attorneys for Plaintiffs/Appellants

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing **BRIEF** to the Plaintiffs/ Respondents' Attorney, Jody K. Burnett, SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, P.O. Box 45000, Salt Lake City, Utah 84145 on this 24 day of May, 1989.



koller/brief

ADDENDUM A

Northwest quarter of the Southwest quarter of Section 8, Township 14 North of Range One West of the Salt Lake Meridian, which said water is now being used and has been used for more than forty years on West half of the Southeast quarter of Section 8, Township 14 North of Range One West of the Salt Lake Meridian.

Together with a right of way over the land of the grantors including an easement for travel and the right to construct, operate and maintain water pipe lines with all accessories thereto, to carry said water from spring to reservoir over the land described as follows:

A 20 foot right of way over the Southeast quarter of Section 8, and the Northeast quarter of Section 17, Township 14 North, Range One West of the Salt Lake Base and Meridian.

Grantors reserve the right to use water for human drinking and stock watering purposes. This use to be confined to a water flow through a 3/4" tap, and grantee agrees to pipe the said water to the home of Lars Pearson for culinary and domestic purposes. All water to be measured through a culinary meter.

5. Defendants' Predecessor in interest reserved the right to use water for human drinking and stock watering purposes. This use to be confined to a water flow through a 3/4 inch tap and Grantees (Cornish) agreed to pipe the said water to the home of Lars Pearson, Defendants' predecessor, for culinary and domestic purposes. All water to be measured through a culinary water meter. The tap is presently situated approximately 50 feet West of the Defendants' residence. However, as long as Cornish provides the water through a 3/4 inch tap from the Pearson Spring, that complies with the deed, regardless of where the tap is located in relation to the residence.

IN THE SUPREME COURT OF THE STATE OF UTAH

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Cornish Town, a Utah municipal corporation,
Plaintiff, Appellee, and Cross-Appellant,

v.

Evan O. Koller and Marlene B. Koller, husband and wife,
Defendants, Appellants, and Cross-Appellees.

No. 19981

F I L E D
July 20, 1988

Geoffrey J. Butler, Clerk

First District, Cache County
The Honorable VeNoy Christoffersen

Attorneys: George W. Preston, Logan, for Appellants
Reed L. Martineau, Jody K. Burnett, Salt Lake City, for Appellee

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HALL, Chief Justice:

I

Cornish Town ("Cornish") initiated this action after a dispute arose over certain water rights and rights of way. Kollers counterclaimed for expenses associated with installing a waterline between Pearson Spring and their home. The case was tried to the court, without a jury. Thereafter, the court, ruling from the bench, entered findings of fact and conclusions of law providing in pertinent part:

FINDINGS OF FACT

. . . .

> 3. The Defendants are the owners of real property surrounding the Pearson Spring . . . and presently receive water for culinary and domestic purposes at their home through a private water line which is connected to the Plaintiff's line that carries water from the Pearson Spring to the Plaintiff's reservoir and treatment facilities.
>
> 4. That by deed . . . [certain named parties, including Defendants' predecessor

in interest] conveyed to Cornish Town [among other things, certain water rights].

5. Defendants[’] Predecessor in interest reserved the right to use water for human drinking and stock watering purposes. This use to be confined to a water flow through a 3/4 inch tap and Grantees (Cornish) agreed to pipe the said water to the home of Lars Pearson, Defendants[’] predecessor, for culinary and domestic purposes. All water to be measured through a culinary water meter. The tap is situated approximately 50 feet West of the Defendants’ residence.

6. That the Defendants acquired the right, title and interest . . . as it relates to the water right to be used through the 3/4 inch tap.

7. That Emma Marie Pearson Dobbs, the owner of an undivided one-fifth interest in and to the Spring set forth above, did not convey her interest to Cornish Town, but by deed conveyed such water rights and real property to the Defendants herein as set forth in a deed . . . .

. . . .

13. The Court finds from the testimony of the witnesses that Cornish Town has not be [sic] reason of the nature of its improvements in the Pearson Spring Basin area, effectively controlled and appropriated all of the water coming from the Pearson Spring area.

14. The Pearson Spring water flowing down Butler Hollow has been beneficially used by the Pearsons and their successors the Kollers.

15. That Plaintiff’s evidence has failed to show a five-year period of non-use from the Pearson Spring.

16. That the Defendants are the owners of 1/5 interest in the Pearson Spring to cover the irrigation period from

April 1st to September 30th, together with year round stock watering rights as set forth in the Kimball Decree . . . .

17. That Defendants have the right to have their share of water from Pearson Spring flow into Butler Hollow during the irrigation period as described above and for stock watering.

18. That the Defendants are the owners of the rights to culinary water from the Pearson Spring as set forth in the quit claim deed from Emma Pearson . . . . By reason thereof the Defendants are not an appropriator of the water and Defendants' rights are fixed by the grant in the deed to Emma Pearson, et al[.] and her successors in interest . . . .

. . . .

20. The Court finds that the Defendants are entitled to receive the water but that Defendants are not entitled to say where they receive it from, and that the source is not restricted solely to the Pearson Spring. The Court finds that the Plaintiff is entitled to determine where the union with the Cornish line will be located and shall thereafter provide and pipe through a 3/4 inch tap to the home of the Defendants, culinary water as set forth in the deed.

21. The Court finds that the Pearson Spring water supply is not one single spring, but may be composed of several springs.

22. That Defendants' Counterclaim for damages for the installation of a pipeline is hereby denied.

. . . .

CONCLUSIONS OF LAW

. . . .

3. That judgment should enter decreeing that the Defendants are the owners of a right to a one-fifth in

> Pearson Spring to cover the irrigation period from April 1st to September 30th of each year and for stock watering and domestic purposes as adjudicated in the Kimball Decree to flow down Butler Hollow.
>
> 4. That Defendants are not an appropriator of the tap water from the Cornish Municipal water system, but are the owners of a right to culinary water as evidenced by a grant in a deed . . . from Emma Pearson . . . .
>
> 5. The Court concludes that the grant of the water right is not restricted solely to the source of water of Pearson Spring. The Court further concludes that the Plaintiff is entitled to determine where the union will be with the Cornish line and to provide and pipe through a 3/4 inch tap to the home of Defendants for the purposes set forth in the grant.
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> 6. That Defendants are not entitled to prevail on Defendants' Counterclaim.

Judgment was entered in accordance with these findings, and the parties brought their respective appeals.

II

Kollers first argue on appeal that the trial court erred by finding that Cornish had the right to determine the point of connection of Kollers' culinary waterline with the Cornish water system. They claim their right to receive culinary water arises from a reservation in a deed given by Kollers' predecessors in interest (Pearsons) to Cornish wherein water rights in and to "one certain unnamed spring," now known as the Pearson Spring, were conveyed. Accordingly, Kollers contend that they are entitled to receive their water from the Pearson Spring and not Cornish's general culinary water supply. Cornish responds that the deed is silent concerning the location of the tap with the point of connection to Cornish's water system.

The deed, wherein several members of the Pearson family granted "[a]ll the right, title and interest . . . in all water and water rights in and to one certain unnamed spring," which is now known as Pearson Spring, contains the following provision:

> Grantors reserve the right to use water for human drinking and stock-watering purposes. This use to be confined to a water flow through a 3/4" tap, and grantee agrees to pipe the said water to the home of Lars Pearson, for culinary and domestic purposes. All water to be measured through a culinary meter.

Resolution of this first issue requires construction of the grant. Utah Code Ann. § 73-1-10 (1980) provides that water rights shall be transferred by deed in substantially the same manner as real estate, with an exception which is not relevant here. Accordingly, the rules governing the construction of deeds generally apply when construing an instrument conveying water rights.[1] The primary rule regarding construction of deeds is to give effect to the intentions of the parties as expressed in the deed as a whole.[2] In this regard, we have stated that in the absence of ambiguity, the construction of a deed is a question of law for the court.[3] In such a case, we are not bound by the trial court's determination of the meaning of the writing.[4]

In the instant case, the trial court concluded that Kollers' water right under the deed was not restricted "solely to the source of water of Pearson Spring." However, the plain language of the deed indicates that the grantors "reserved" in themselves the water rights indicated. By its very nature, a "reservation" is a clause in a deed or other instrument of conveyance by which the grantor creates and reserves to himself some right, interest, or profit relative to the estate granted. Ownership is one of the conditions which must exist as the basis of a valid reservation.[5] Since Kollers' predecessors in interest, the Pearsons, did not own the Cornish water system, the Pearsons could not have "reserved" to themselves rights to water from that system. Indeed, Cornish's brief appears to indicate that its water system was not even built at the time of the conveyance. Instead, the Pearsons must have "reserved" in themselves rights in the water which was the subject of the conveyance, namely, the water flowing from Pearson Spring.

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1. See Utah Code Ann. § 73-1-10 (1980); see also 93 C.J.S. Waters § 190, at 986 (1956).
2. Chournos v. D'Agnillo, 642 P.2d 710, 712 (Utah 1982); Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979).
3. Hartman, 596 P.2d at 656.
4. See id.
5. See id. at 656-57.

In view of this analysis, the arguments advanced by Cornish are unavailing. If Cornish did not desire to supply water under the deed from a specific source of water, it should not have accepted a deed containing this reservation. Accordingly, we find Kollers' first point to have merit, requiring a partial reversal of the judgment in this case.

III

Kollers' next point is that the trial court erred by finding that the "Pearson Spring water supply is not one single spring, but may be composed of several springs." Kollers' argument fails for several reasons. First, review of findings of fact is controlled by rule 52(a) of the Utah Rules of Civil Procedure. To mount a successful challenge to trial court findings under that rule, an appellant must marshall the evidence supporting the trial court's findings. Only then can we determine whether those findings are clearly erroneous. Because Kollers have failed to make such a showing in this case, the trial court's determination will not be disturbed.[6]

Second, Kollers have failed to provide the Court with the entire transcript of the proceedings below. This Court has repeatedly held that an appellant may not succeed on a claim of error when relevant portions of the record are not before us; in such a case, the proceedings before the trial court are presumed to support the trial court's findings.[7] For the above reasons, we find Kollers' second point to be without merit.

IV

Kollers' third point is that the trial court erred by dismissing their counterclaim. The trial court determined that Kollers were not entitled to recover on their counterclaim, which was brought to capture the cost of installing a new pipeline. Kollers installed the pipeline arter Cornish advised them that it had no responsibility to replace the line. In ruling on the counterclaim from the bench, the trial court stated:

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6. See Redevelopment Agency v. Tanner, 740 P.2d 1296, 1301 (Utah 1987).

7. Burke v. Burke, 733 P.2d 498, 498 (Utah 1986) (per curiam); Wood v. Myrup, 681 P.2d 1255, 1257 (Utah 1984); see In re Cluff's Estate, 587 P.2d 128, 128 n.1 (Utah 1978); see also Union Bldg. Materials Corp. v. Kakaako, 5 Haw. App. 146, ___, 682 P.2d 82, 86-88 (1984), reconsideration granted, 5 Haw. App. 683, 753 P.2d 253.

As to the damages, there is testimony and I feel that under this Cornish was obligated to provide the water as previously stated and in the deed. There's testimony that they were not doing so, there's testimony that they refused to do anything about it. Now I feel that Mr. Koller had the right then to go see about his water pressure. And he testified that when he opened it up he found it full, the T, full of debris, roots, clogging his water. And I feel that he would have a right to replace that and put it in the proper shape to get his pressure. There's no evidence there's anything wrong with the rest of the line. I just think he went too far. This doesn't give him a right to design his own water system, change its location, when he could make his own remedy and would be required I think and could charge the bill to correct the problem at the place where it came out of the T, and that's the only evidence we have that there was anything wrong with it. There isn't any evidence there was anything wrong with the line going all the way down to the house so he could put in his other one.

[Defense Counsel]: There was evidence that the bottom of the line was also filled up and its size was becoming smaller than the restriction.

THE COURT: I know, but there is no evidence that you couldn't have--that you had to replace this whole line, put in a different place with four-inch pipe or even replace the whole line. All that line that's left there under the ground, you might still be able, if you get a proper connection on it, will work fine. I just say that on the Counterclaim you failed to convince me by the preponderance of the evidence that all of that was necessary. I'm convinced by the preponderance of the evidence there was something needed to be done up to where the water came out of that piece that you got in evidence, but that's about as far as I say your proof went.

> Now if you have a specific bill on that portion of it I'll grant judgment for that. But I didn't peruse those bills enough to pick that out. But not the whole line from where you change direction and go all the way down the hill.

Kollers have not drawn the Court's attention to any evidence on this issue contradicting the trial court's perception thereon. Therefore, we find this point of Kollers' appeal to be without merit.

V

Finally, Cornish in its cross-appeal contends that the trial court erred in failing to clarify the respective seasonal water rights of the parties and in concluding that Kollers held a one-fifth interest in the Pearson Spring. As support for these claims, Cornish argues that Kollers and their predecessors forfeited the disputed water right by the absence of any beneficial use thereof. Also, Cornish contends that Kollers should be equitably estopped from claiming the one-fifth interest by virtue of acquiescence to Cornish's use of all the Pearson Spring water in the town's construction and ongoing maintenance of its municipal waterworks. We disagree.

Again, the designated record on appeal contains only a partial transcript of the proceedings involved.[8] Therefore, we are unable to review the evidence as a whole and must presume that the trial court's ruling was founded upon admissible, competent, and substantial evidence.[9]

Furthermore, Cornish's claims appear predicated on our acceptance of its version of the testimony which was given and how the trial court should have perceived the circumstances as they existed. However, the facts Cornish advances in support of its arguments are chosen to the exclusion of other evidence in the partial record we have before us supporting the lower court's decision. Due to the trial court's advantaged position, the presumptions favor its judgment.[10] Where there is dispute and disagreement in the evidence, we assume that the trial court believed those aspects and fairly drew the inferences to be derived therefrom which gave its decision support.[11] To this end, the trial court did not find credible the evidence and

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8. See R. Utah S. Ct. 11(e)(2).
9. Id.; see also Smith v. Vuicich, 699 P.2d 763, 764-65 (Utah 1985) (per curiam).
10. Redevelopment Agency, 740 P.2d at 1301-02.
11. Id.

testimony Cornish presented. Instead, the court viewed the evidence as supporting the determination that Kollers maintained a one-fifth interest in the water from Pearson Spring and that the watering period runs as specified. Given the record before us and the facts of this case, these determinations do not merit reversal herein.

Based upon the foregoing, the decision of the trial court is affirmed in part and reversed in part and the case is remanded for proceedings consistent with this opinion. Each party to bear its own costs.

WE CONCUR:

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice